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No. 08-1393

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In The

Supreme Court of the United States

STEPHEN EDWARD MAY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To Division One Of The Court Of Appeals Of The State Of Arizona

REPLY BRIEF FOR PETITIONER

JEAN-JACQUES CABOU
Counsel of Record
KATHLEEN BRODY O'MEARA
JOSEPH N. ROTH
OSBORN MALEDON, P.A.
2929 North Central Avenue,
21st Floor
Phoenix, AZ 85012
(602) 640-9000

TRACEY WESTERHAUSEN
DEBUS, KAZAN &
WESTERHAUSEN, LTD.
335 East Palm Lane
Phoenix, AZ 85004
(602) 257-8900

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

In the absence of guidance from this Court, Arizona and its sister states have fallen into conflict regarding whether and to what extent they may "manipulate the prosecutor's burden of proof by . . . placing the affirmative defense label on 'at least some elements' of traditional crimes." *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)). Conceding that "the constitutional validity of Arizona's child-molestation statutes is a matter of great importance" (Br. in Opp'n 30), the State nevertheless resorts to misdirection in its attempt to divert the Court from the narrow, properly presented question raised by this case. *Apprendi* is not, as the State contends, limited to "construing the Sixth Amendment's jury-trial guarantee." (Br. in Opp'n 32.) And, contrary to the State's arguments, May did raise to the Arizona state courts the constitutional challenge presented in his Petition. Finally, published decisions in several states demonstrate that there is real conflict regarding whether a legislature may constitutionally reduce the government's burden to prove the sexual part of a sex crime.

1. The State Misapprehends This Court's Holding in *Apprendi v. New Jersey*, Which Rests Directly on the Due Process Requirement That the Government Prove Every Element of a Crime Beyond a Reasonable Doubt.

The *only* constitutional principle at issue in the Petition is the one enunciated in *Winship* and confirmed in *Apprendi*: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Apprendi*, 530 U.S. at 477 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)) (alteration in *Apprendi*). The State ignores this critical component of *Apprendi*'s rationale when it insists that May's "reliance on *Apprendi* and its progeny . . . is misplaced." (Br. in Opp'n 33.)[1]

The State is similarly wrong when it argues that *Apprendi*'s holding "refers only to those facts that, if found, have the effect of exposing the defendant to a greater punishment than that authorized by the jury's guilty verdict." (Br. in Opp'n 35.) On the contrary, the holding of *Apprendi* is so inextricably linked with the core due process principles enunciated in *Winship* and expounded in *Mullaney v.*

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[1] The State's claim that "Petitioner maintains that the Arizona Legislature[ ] . . . violated his Sixth Amendment right" is bizarre. (*See* Br. in Opp'n 32-33.) No such claim is present in the Petition, nor is the Sixth Amendment ever cited in the Petition.

Wilbur, 421 U.S. 684 (1975), and *Patterson* that the principal dissent suggested that *Apprendi* "would require the Court to overrule . . . *Patterson*." *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting). Thus, the State's argument that *Apprendi* "applies solely to sentence enhancement provisions" (Br. in Opp'n 36 (citation omitted)) mistakenly presumes the answer to the question presented in the Petition and so far left unanswered by this Court: Does *Apprendi*'s functional approach apply not only to facts necessary to increase the degree of punishment, but also "to facts that authorize criminal punishment in the first place?" (Pet. 16-17.)

2. May Timely and Fairly Presented His Constitutional Claim to Arizona's Courts.

Without question, May's claim was "properly presented to[ ] the state court that rendered the decision [this Court has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). In his Opening Brief before the Arizona Court of Appeals, whose decision this Court has been asked to review, May's challenge to the jury instructions given in accordance with Arizona Revised Statutes sections 13-1407(E) and 13-1410 literally begins and ends with the Constitution. The first argument in May's Opening Brief is titled, "**The jury instructions unconstitutionally placed the burden of proof on the defendant**." (Br. in Opp'n 12a.) After raising a statutory argument, May returned to press the basic constitutional guarantee at issue: "This means that

we are left with the cherished principle and constitutional due process right, imposing upon the state the burden to establish each element of the offense beyond a reasonable doubt. This was not done in this case." (*Id.* at 15a.) As authority for this proposition, May cited *Winship* and the Fifth and Fourteenth Amendments. (*Id.*)[2] These statements plainly brought May's constitutional claim "to the attention of the state court with fair precision and in due time" and therefore place the question presented in the Petition within the Court's jurisdiction. *Street v. New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)).

The State's claim that the Court of Appeals "had no reason to understand" that May had raised a federal due process claim (Br. in Opp'n 27-28) is particularly vexing because, in response to May's having raised the issue in his Opening Brief, the State itself pitched the issue to the forefront in its Answering Brief in that court. At the beginning of its "Argument" section in that brief, the State urged that "[a]lthough the Fourteenth Amendment's Due Process Clause obligates the prosecution to prove every *element* of a criminal offense beyond a reasonable doubt, legislatures may constitutionally require the defendant to

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[2] The State's attempt to devalue the citations to *Winship* and the Constitution as occurring "in the seventy-ninth footnote of his opening brief without accompanying argument" is misleading. (*See* Br. in Opp'n 24.) Every citation in that brief appears in a footnote rather than in the text.

bear the burden of proving affirmative defenses." (Reply Br. App. 5 (citing *Winship* and *Martin v. Ohio*, 480 U.S. 228, 231-34 (1987)).)

The State's related argument that May's reliance on *Winship* in his Opening Brief in the Arizona Court of Appeals "did not squarely present the constitutional claim presented in his petition" (Br. in Opp'n 24) is premised on the mistaken belief that *Winship* does not address precisely the due process principle implicated in this case. (*See* Br. in Opp'n 24-25, 28-29.) Both *Winship* and this case hinge on the constitutional requirement that, before criminally punishing one of its citizens, the state must "show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." *In re Winship*, 397 U.S. at 363 (quoting *Davis v. United States*, 160 U.S. 469, 493 (1895)). Contrary to the State's suggestion (Br. in Opp'n 25), May did not need to cite the later cases of *Mullaney* and *Patterson* to preserve his *Winship*-based due process claim. *See Zimmerman*, 278 U.S. at 67 ("No particular form of words or phrases is essential . . . ."); *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982) (The Supreme Court's "jurisdiction does not depend on citation to book and verse.").

Furthermore, the question presented in the Petition was first raised in the trial court. May requested a jury instruction requiring the State to prove sexual motivation beyond a reasonable doubt (Pet. 4; Pet. App. 35) and argued that "the State is obliged to prove a motivation of sexual interest as an element of

the offense" (Pet. App. 38). In response, the State relied on *State v. Sanderson*, 898 P.2d 483 (Ariz. Ct. App. 1995), *review denied* (Ariz. July 11, 1995), to argue that "[t]he defendant constitutionally carries the burden of proving lack of sexual motivation by a preponderance of the evidence." (Pet. App. 50-51.) "This should have sufficed to alert the trial judge to petitioner's reliance on due process principles." *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978) (holding as sufficient to raise federal due process claims petitioner's objection regarding "an instruction on the presumption of innocence" that "invoked fundamental principles of judicial fair play" (internal alteration and quotation marks omitted)).[3]

Moreover, the State is mistaken to suggest that a challenge to the jury instructions did not preserve a challenge to the statutes on which the jury instructions were premised. (*See* Br. in Opp'n 10, 26.) "[T]he jury instruction[s'] construction of [Arizona's statutes] 'is a ruling on a question of state law that is as

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[3] The State contends that if a defendant does not squarely raise a constitutional objection at trial, Arizona law deems the argument waived or precluded on appeal. (Br. in Opp'n 24.) This is false. *See State v. Henderson*, 115 P.3d 601, 607 (Ariz. 2005) ("Fundamental error review . . . applies when a defendant fails to object to alleged trial error."). Even if May had said nothing about the jury instructions applying Arizona Revised Statutes sections 13-1407(E) and 13-1410, his claim of error to the Arizona Court of Appeals would have remained viable. *Cf. id.* at 608, 610 (holding that non-objected-to *Apprendi/Blakely* error was fundamental and would have required new sentencing proceedings).

binding on [the Supreme Court] as though the precise words had been written into' the statute[s]." *Virginia v. Black*, 538 U.S. 343, 364 (2003) (plurality opinion) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)) (holding unconstitutional provision of statute "as interpreted by the jury instruction"). And Arizona appellate courts have at least twice construed Arizona Revised Statutes sections 13-1407(E) and 13-1410 to be consistent with the jury instructions May challenges here. *See State v. May*, No. 1 CA-CR 07-0144, 2008 WL 2917111, at **1-2 (Ariz. Ct. App. July 24, 2008) (Pet. App. 3-5); *State v. Simpson*, 173 P.3d 1027, 1030 (Ariz. Ct. App. 2007) (Pet. App. 19).

Finally, the State misrepresents Arizona law when it urges this Court to deny the Petition so as not to be the "very first to address" the constitutionality of Arizona's statutes. (Br. in Opp'n 18.) In *Sanderson*, the Arizona Court of Appeals, explicitly relying on this Court's holding in *Patterson*, explained that Arizona Revised Statutes sections 13-1407(E) and 13-1410 "did not allocate the burden of proof on any element to the defendant but, rather, created an affirmative defense regarding motive. This is constitutionally permissible." 898 P.2d at 491. Indeed, the State cited *Sanderson* to the trial court *for this very proposition*. (*See* Pet. App. 50-51.) Having relied upon *Sanderson* to buttress its constitutional argument in the trial court, the State cannot now claim that no Arizona appellate court has ever before addressed the constitutionality of the statutes challenged in the Petition.

3. States Are in Conflict Regarding Whether Legislatures May Reduce the Government's Burden to Prove Illicit Intent in Molestation Cases.

Without the guidance of defined constitutional limits on their ability to manipulate burdens of proof, states have disagreed regarding the constitutionality of statutes that reduce the government's burden to prove illicit intent in child molestation prosecutions. (Pet. 18-20); *compare State v. Tibbetts*, 281 N.W.2d 499, 500-01 (Minn. 1979) (statute requiring proof that touching "can reasonably be construed as being" for a sexual or aggressive purpose unconstitutionally shifted the burden of proof), *with In re Wentworth*, 651 N.W.2d 773, 776 (Mich. Ct. App. 2002) (statute requiring proof that touching "can reasonably be construed as being" for a sexual purpose *did not* unconstitutionally shift the burden of proof). Rather than confront the merits of the conflicting rationales, the State maintains that the cases discussed are irrelevant because "the statutes at issue in the cases that Petitioner has cited contain language not found in Arizona's child-molestation laws." (Br. in Opp'n 30.) But whether the statutes at issue in *Tibbetts* or *Wentworth*, for instance, are identical to Arizona's statutes is unimportant. What is critical is that in each statutory scheme the legislature reduced the government's burden to prove the sexual part of a sex crime to something less than beyond a reasonable doubt. Reflecting the tension between *Apprendi* and *Patterson*, state courts are split

regarding whether such a reduction is constitutionally permissible.

"[T]here are obviously constitutional limits" on the powers of the states to "reallocat[e] burdens of proof." *Patterson*, 432 U.S. at 210. (Pet. 9.) The divergent cases – including most prominently this one – demonstrate the need for this Court to resolve the tension between *Apprendi* and *Patterson* and provide state legislatures and courts with much needed guidance.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

JEAN-JACQUES CABOU
Counsel of Record
KATHLEEN BRODY O'MEARA
JOSEPH N. ROTH
OSBORN MALEDON, P.A.
2929 North Central Avenue,
21st Floor
Phoenix, AZ 85012
(602) 640-9000

TRACEY WESTERHAUSEN
DEBUS, KAZAN &
WESTERHAUSEN, LTD.
335 East Palm Lane
Phoenix, AZ 85004
(602) 257-8900

Attorneys for Petitioner

ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, Appellee. v. STEPHEN EDWARD MAY, Appellant.	1 CA-CR 07-0144 Maricopa County Superior Court No. CR-CR2006- 030390-001 SE

APPELLEE'S ANSWERING BRIEF

Terry Goddard
Attorney General
(Firm State Bar No. 14000)

Randall M. Howe
Chief Counsel
Criminal Appeals Section

Robert A. Walsh
Assistant Attorney General
Criminal Appeals Section
1275 West Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686
(State Bar Number 016071)
Attorneys for Appellee

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court properly instructed the jury that the absence of sexual motivation was an affirmative defense to be proven by Appellant by a preponderance of the evidence, notwithstanding Appellant's contention that sexual motivation is an element of child molestation, as currently defined by A.R.S. § 13-1410(A).

* * *

ARGUMENTS

I

THE TRIAL COURT'S INSTRUCTIONS WERE CORRECT BECAUSE SEXUAL MOTIVATION IS NOT AN ELEMENT OF CHILD MOLESTATION, AND THE LACK OF SEXUAL MOTIVATION IS AN AFFIRMATIVE DEFENSE.

Appellant contends that the trial court's instructions: (1) unconstitutionally relieved the State of the burden of proving the alleged element of sexual motivation; and (2) impermissibly classified the lack of sexual motivation as an affirmative defense that he had to prove by a preponderance of the evidence. However, the version of A.R.S. § 13-1410 in effect when Appellant committed the instant offenses did *not* include sexual motivation among the elements of child molestation. Instead, A.R.S. § 13-1407(E) establishes lack of sexual motivation as an affirmative defense that the accused must prove by a preponderance of the evidence.

A. Pertinent Procedural History.

Appellant requested the trial court to instruct the jury that "the State is obligated to prove a motivation of sexual interest as an element of the offense." (R.T. 1/9/07, at 71-72.) Appellant further posited that the lack of sexual motivation was not an affirmative defense under A.R.S. § 13-103(B) because it established "lack of intent." (*Id.* at 72-73.) The trial court sustained the State's objection to these proposed instructions, based on its conclusion that sexual motivation is not an element of child molestation, but instead an affirmative defense. (P.I., Item 212; R.T. 1/10/07, at 98-99.) The trial court thus instructed the jury as follows:

> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of 15. It's a defense to child molestation that the defendant was not motivated by sexual interest.
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of child molestation. The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the

> affirmative defense of lack of sexual motivation by a preponderance of the evidence, you must find the defendant not guilty of the offense of molestation of a child.

(R.T. 1/10/07, at 107-08.)

Appellant subsequently challenged the propriety of these instructions in his unsuccessful motion for new trial. (P.I., Item 241; R.T. 2/17/07, at 7.)

B. Pertinent Legal Principles.

The decision to refuse a jury instruction is within the trial court's discretion, and the appellate court will not reverse absent a clear abuse of that discretion. *See State v. Bolton,* 182 Ariz. 290, 309 (1995). "In assessing the adequacy of jury instructions, the instructions must be viewed in their entirety in order to determine whether they accurately reflect the law." *State v. Hoskins,* 199 Ariz. 127, 145, ¶ 75 (2000). Moreover, "failure to give a certain instruction is not reversible error unless it is prejudicial to the rights of a defendant, and such prejudice will not be presumed but must appear from the record." *State v. Sierra-Cervantes,* 201 Ariz. 459, 464, ¶ 29 (App. 2001).

"A trial court does not err by refusing an instruction that is an incorrect statement of law." *State v. Barr,* 183 Ariz. 434, 443 n.3 (App. 1995). "If a defendant's requested instruction contains an error or misstatement of the law, it is not the duty of the trial court to correct that statement." *State v. Harris,* 107

Ariz. 41, 45 (1971). "When an instruction requested to be given is good in part and bad in part, the court is not required to separate the good from the bad, and the refusal to give such an instruction is not an abuse of discretion." *State v. Mitchell,* 204 Ariz. 216, 220, ¶ 22 (App. 2003). *Cf. State v. Valenzuela,* 114 Ariz. 81, 84 (App. 1977).

C. ARGUMENT.

Although the Fourteenth Amendment's Due Process Clause obligates the prosecution to prove every *element* of a criminal offense beyond a reasonable doubt, *see In re Winship,* 397 U.S. 358, 364 (1970), legislatures may constitutionally require the defendant to bear the burden of proving affirmative defenses and thereby relieve the prosecution of the burden of *negating* affirmative defenses beyond a reasonable doubt.[5] *See Martin v. Ohio,* 480 U.S. 228, 231-34 (1987); *State v. Casey,* 205 Ariz. 359, 362-63, ¶¶ 11-15 (2003); *State v. Farley,* 199 Ariz. 542, 545, ¶¶ 11-17 (App. 1999). Consequently, jury instructions affixing the burden of proving a defense upon the accused do not offend due process unless the criminal statute at issue requires the prosecution to disprove the asserted defense as an element of the crime. *See,*

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[5] "[A]n affirmative defense is a matter of avoidance of culpability even if the State proves the offense beyond a reasonable doubt." *State v. Jeffrey,* 203 Ariz. 111, 114, ¶ 10 (App. 2003).

e.g., Casey, 205 Ariz. at 366, ¶ 28; *Jeffrey,* 203 Ariz. at 114, ¶ 11; *Farley*, 199 Ariz. at 545, ¶¶ 14-17.

Given these principles, the threshold question is whether the defendant's sexual motivation is an element of child molestation that the State must prove beyond a reasonable doubt. Thus, this Court's analysis must begin with the language of A.R.S. §§ 13-1410 and -1407 because "the best and most reliable index of a statute's meaning is the plain text of the statute." *State v. Christian,* 205 Ariz. 64, 66, ¶ 6 (2003). "When the language of a statute is clear, it is determinative of the statute's construction." *State v. Thompson*, 200 Ariz. 439, 440, ¶ 6 (2001).

Under the version of A.R.S. § 13-1410(A) in effect at the time of Appellant's offenses, "[a] person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact . . . with a child under fifteen years of age." "'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body." A.R.S. § 13-1401(2) (2005). Finally, A.R.S. § 13-1407(E) provides, "It is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by a sexual interest."

Based upon the plain meaning of these statutes, this Court very recently not only reaffirmed its prior holding that sexual motivation is *not* an element of child molestation, but also held that the lack of sexual motivation is *an affirmative defense* that the

accused must prove by a preponderance of the evidence. *See State v. Simpson,* 2007 WL 4394845 *3, ¶¶ 17-19 (Ariz. App. Dec. 18, 2007). *Cf. State v. Getz,* 189 Ariz. 561, 563-66 (1997) (holding that statute defining sexual abuse under A.R.S. § 13-1404 must be applied "as written" because its text is "plain on its face," and refusing to "inject" any affirmative defense under § 13-1407 into the crime's elements); *State v. Sanderson,* 182 Ariz. 534, 542 (App. 1995) ("The statutes in question did not allocate the burden of proof on any element to the defendant but, rather, created an affirmative defense regarding motive."); *State v. Sandoval,* 175 Ariz. 343, 345-47 (App. 1993) (rejecting the argument that A.R.S. § 13-1407(E) renders sexual motivation an element of the indecent-exposure statute).

Because the trial court instructed the jury that the burden of proving every element of child molestation beyond a reasonable doubt "always remained on the State," R.T. 1/10/07, at 104, 107-08, the jury instructions requiring Appellant to prove the lack of sexual motivation by a preponderance of the evidence comported with due process. *See Casey,* 205 Ariz. at 366, ¶ 29; *Sierra-Cervantes,* 201 Ariz. at 461-63, ¶¶ 13, 22-24; *Farley,* 199 Ariz. at 545, ¶ 13.

Appellant, however, relies upon *State v. Brooks,* 120 Ariz. 458 (1978), and *State v. Turrentine,* 152 Ariz. 61 (App. 1986), to argue that the elements of child molestation still include proof that the acts involved were "motivated by an unnatural or abnormal sexual interest or intent with respect to

children." (OBR, at 14, nn. 75-76.) These two cases, however, are inapposite because they construed A.R.S. § 13-1410's differently worded predecessors, A.R.S. § 13-653 (repealed by Laws 1977, Ch. 142, § 66), and former A.R.S. § 13-1410 (amended by Laws 1993, Ch. 255, § 29). The differences in the statutory language between A.R.S. § 13-1410's current and antecedent versions very recently prompted this Court to reject another child-molestation defendant's argument that far more recent precedent than *Brooks* and *Turrentine – State v. Lujan,* 192 Ariz. 448 (1998), and *Maricopa County Juv. Action No. JV-121430,* 172 Ariz. 604 (App. 1992) – established sexual motivation an element of child molestation:

> Neither *JV-121430* nor *Lujan* construed the current version of A.R.S. § 13-1410, enacted in 1993, which differs from the previous version as the current version does not contain the language "knowingly molests." *See* 1993 Ariz. Sess. Laws, ch. 255, § 29. These cases are, therefore, not persuasive in construing the applicable version of the statute. Also, the current version of A.R.S. § 13-1410 makes molestation of a child a crime if a person "intentionally or knowingly engag[es] in . . . sexual contact . . . with a child under fifteen years of age." Nothing in either *JV-121430* or *Lujan* compels this court to interpret the A.R.S. § 13-1410, as amended, to require proof of "sexual interest" as an element of the offense.

Simpson, at *4, ¶ 22 (footnotes omitted).

Nonetheless, Appellant maintains that the State must prove lack of sexual motivation as an element of child molestation, for three reasons: (1) the lack of sexual motivation is a "legal defense," as defined in *United States v. Cameron,* 907 F.2d 1051, 1063 (11th Cir. 1990), because it negates the "specific intent" element of Arizona's child-molestation statute, as manifested by "case law" (*Brooks* and *Turrentine*); (2) A.R.S. § 13-1407(E) identifies lack of sexual motivation as a "defense," not an "affirmative defense"; and (3) A.R.S. § 13-103(B)'s definition of "affirmative defense" excludes "any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification, or *lack of intent.*" (OBR at 13-15; emphasis added.) Besides being foreclosed by *Simpson's* sound reasoning and correct application of the rules of statutory construction, Appellant's argument suffers from several additional fatal flaws.

First, Appellant's reliance upon *Brooks* and *Turrentine* is misplaced because these cases construed two former and differently-worded versions of A.R.S. § 13-1410. Because the present child-molestation statute's plain text does *not* include the requirement that the act be motivated by an unnatural or abnormal sexual interest with respect to children, this Court may not rely upon common-law to engraft into A.R.S. § 13-1410 elements that the Legislature did not see fit to include. *See State v. Miranda,* 200 Ariz. 67, 69, ¶ 5 (2001); *State v. Ramsey*, 211 Ariz. 529, 538, ¶ 28 n.5 (App. 2005); *Vo v. Superior Court in*

and for County of Maricopa, 172 Ariz. 195, 202 (App. 1992).

Appellant's reliance on A.R.S. § 13-103(B)'s definition of "affirmative defense" is equally misplaced. According to Appellant, "lack of sexual motivation" does not qualify as an affirmative defense under the statutory definition because the absence of sexual motive allegedly establishes "lack of intent" and thereby negates the child-molestation statute's *mens rea* element. The fundamental defect dooming this argument is its mistaken assumption that the *motive* to commit a crime and criminal *intent* are synonymous:

> Motive and intent are in no sense synonymous. They mean two different things. . . . Motive is the moving cause which induces action; it has to do wholly with desire. Intent is the purpose or design with which an act is done, and involves the will. . . . Motive is not an essential ingredient of crime; intent is always so, whether the offense be of common-law or statutory origin.

State v. Hughes, 125 S.W.2d. 66, 70 (Mo. 1939) (citations omitted); *see also Lee v. City of Los Angeles,* 92 F.3d 842, 850 (9th Cir. 1996); *Craun v. State*, 762 N.E. 230, 237 n.11 (Ind. App. 2002); *State v. Ruebke,* 731 P.2d 842, 852 (Kan. 1987); *People v. Hoffman,* 570 N.W.2d 146, 148 (Mich. App. 1997); *State v. Bronson,* 496 N.W. 882, 890 (Neb. 1990); *People v. Weiss,* 300 N.Y.S. 249, 255 (1937); *Snakenberg v. Hartford Cas. Ins. Co.,* 383 S.E.2d 2, 7 (S.C. App. 1989); *State v.*

Powell, 893 P.2d 615, 624-25 (Wash. 1995); BLACK'S LAW DICTIONARY 1014 (6TH ED. 1991).

Although proof of Appellant's sexual motivation might have helped the State persuade the jury that Appellant entertained the *mens rea* to commit child molestation, lack of sexual motivation remains a valid affirmative defense under A.R.S. § 13-103(B) because criminal intent is not negated by the lack of criminal motive. *Cf. State v. Williams,* 183 Ariz. 368, 376 (1995); *State v. Rivera,* 152 Ariz. 503, 517 (1987).

Finally, the fact that A.R.S. § 13-1407 is entitled "defenses" instead of "affirmative defenses" does *not* support Appellant's argument that subsection (E)'s "lack of sexual interest" merely establishes a "legal defense" that the State must disprove. This argument overlooks the fact that Arizona courts have repeatedly classified statutory exceptions to criminal liability, both in A.R.S. § 13-1407 and other statutes, as "affirmative defenses," even when the statutory provision at issue contains no language expressly knighting its exception with the "affirmative defense" nomenclature. *See Getz,* 189 Ariz. at 565; *Simpson,* at *3, ¶ 19; *State v. Young,* 192 Ariz. 303, 306-07, ¶¶ 9-16 (App. 1998); *Sanderson,* 182 Ariz. at 542); *State v. Berryman,* 178 Ariz. 617, 621 (App.1994).

Equally detrimental to Appellant's argument, that the State had to prove sexual motivation as an element of child molestation, is the fact that the Legislature promulgated the "lack of sexual motivation" exception in a separate statute, A.R.S.

§ 13-1407(E), and did not expressly include sexual motivation among the elements listed in A.R.S. § 13-1410(A). *See State v. Eagle,* 196 Ariz. 188, 191, ¶ 10 (2000); *State v. Hollenback,* 212 Ariz. 12, 14-15, ¶ 5 (App. 2005).

Even if the lack of sexual motivation were not an "affirmative defense," it would instead constitute a statutory exception for conduct otherwise falling within the scope of the child molestation statute. This alternative classification would be a distinction without a practical difference for this case's outcome because "[a] defendant who relies upon an exception to a criminal statute made by a proviso or distinct clause has the burden of establishing and showing that she comes within the exception." *In re Maricopa County Juvenile Action No. JT9065297,* 181 Ariz. 69, 82 (App. 1994). Stated differently, the inapplicability of a statutory exception is not an element that the State must prove. *See, e.g., State v. Kelly,* 210 Ariz. 460, 463, ¶ 11 (App. 2005); *In re Roy L.*, 197 Ariz. 441, 447, ¶ 19 (App. 2000); *Berryman*, 178 Ariz. at 621-22; *State v. Jung*, 19 Ariz. App. 257, 262 (1973); *State v. Quandt*, 17 Ariz. App. 33, 34 (1972).

Finally, Appellant in this hypothetical construct would still have the burden of proving his lack of sexual motivation "by a preponderance of the evidence" under A.R.S. § 13-202(A) because a statutory exception "functions similarly to an affirmative defense," and a contrary rule would "infuse[ ] unnecessary confusion into Arizona law by announcing an inconsistent burden or standard of proof for

exceptions." *Kelly*, 210 Ariz. at 464, ¶ 15; *see also State v. Grell*, 212 Ariz. 516, 522, ¶ 26 (2006) (requiring capital defendant at sentencing to bear burden of proving mental retardation, which "is like proof of an affirmative defense in that it serves to relieve or mitigate a defendant's criminal responsibility").

Thus, the trial court neither abused its discretion nor violated the Due Process Clause because it correctly instructed the jury on the elements of child molestation and properly placed on Appellant the burden of proving the lack of sexual motivation as an affirmative defense. *See Jeffrey*, 203 Ariz. at 114, ¶ 12.

Even assuming that the trial court's instructions on the burden of proof for the lack of sexual motivation were somehow deficient, any error would be harmless because Appellant was not entitled to an instruction concerning a lack of sexual interest in the first instance. *See State v. Rhymes*, 129 Ariz. 56, 59-60 (1981); *State v. Buggs*, 167 Ariz. 333, 337 (App. 1990). Appellant *never* admitted at trial that he had ever touched the genitalia of Luis, Taylor, and Danielle. Indeed, Appellant testified that he could not remember any one-on-one time with Luis in the classroom. (R.T. 1/10/07, at 43-44.) Moreover, Appellant made no post-arrest statements at all about Luis, unequivocally denied touching Danielle inside the swimming pool, and denied the possibility of even accidentally touching Taylor's vagina while throwing her into the water. (R.T. 1/8/07, at 90-93.) Appellant

testified only that it was *possible* that he touched the vaginas of Taylor and Danielle in the pool, and characterized such possible contact as unintentional, unknowing, accidental, and without sexual interest. To merit an affirmative defense instruction, a defendant must admit to engaging in the charged assaultive conduct. *See State v. Williams,* 132 Ariz. 153, 156 (1982); *State v. Gilfillan,* 196 Ariz. 396, 407, ¶ 41 (App. 2000); *State v. Miller,* 129 Ariz. 42, 43 (App. 1981).

Finally, even if the jury instructions erroneously required Appellant to prove the absence of sexual motivation by an improperly elevated preponderance-of-the-evidence standard, Appellant offered insufficient evidence to create a reasonable doubt that he lacked sexual motivation when he touched the girls' vaginas in the pool. Consequently, any error would be harmless. *See State v. McKeon,* 201 Ariz. 571, ¶¶ 22-31 (App. 2002) (erroneous instruction on voluntary intoxication was harmless because even a properly instructed jury would have rejected this defense); *State v. Tamplin,* 195 Ariz. 246, ¶¶ 12-14 (App. 1999) (instruction incorrectly defining insanity was not fundamental error because the evidence supporting this defense was insufficient).

* * *

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm the trial court's judgments and sentences.

Respectfully submitted,

Terry Goddard
Attorney General
Randall M. Howe
Chief Counsel
Criminal Appeals Section

/s/ Robert A. Walsh
Robert A. Walsh
Assistant Attorney General
Attorneys for Appellee